No. 89-759

In The

Supreme Court of the United States

October Term, 1989

ANNA KOWALESKI, WIDOW OF PETER KOWALESKI, JAMES T. LESHO, ESQUIRE,

Petitioners,

vs.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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43 pp

QUESTIONS PRESENTED

1. May a court of appeals discipline a lawyer through imposition of costs without providing any notice of the consideration of sanctions or any opportunity to be heard, and without citation to authority under the Federal Rules of Appellate Procedure, nor any request for costs from the opponent?[1]

2. When applying Rule 15(a) of the Federal Rules of Appellate Procedure, is the Third Circuit free to ignore the functional equivalency test established by this Court in *Torres v. Oakland Scavanger Co.*, 108 S. Ct. 2045 and utilized by the Fifth, Sixth and Seventh Circuit Courts of Appeals?

3. When confronted with a motion for substitution of a correct name of a representative in a petition for review from the Black Lung Benefits Review Board, is the Third Circuit at liberty to ignore the concurrence of the Director of the Black Lung Benefits Program to the motion and the applicability of Rule 43 of the Federal Rules of Appellate Procedure, and Dismiss the Petition for Review under Rule 3(c) of the Federal Rules of Appellate Procedure?

4. Is a mutual mistake as to the identity of a Black Lung claimant's representative, which mutual mistake admittedly does not surprise or prejudice the Director of the Black Lung Benefits Program, the type of mistake susceptible to correction pursuant

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1. A petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is pending on a question similar to this in *Platt v. United States Court of Appeals for the Seventh Circuit*, No. 88-1756 (April, 1989).

to 28 U.S.C. § 1653 and/or Rule 2 of the Federal Rules of Appellate Procedure?[2]

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2. A petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit is pending on a question similar to this in *Minority Employees of the Tennessee Department of Employment Security, et al.*, 88-2128 (Filed June 29, 1989).

LIST OF PARTIES TO THE ACTION

The parties to the action below were:

Anna Kowaleski, widow of Peter Kowaleski, Petitioner; and Director, Office of Workers' Compensation Programs, United States Department of Labor, Respondent.

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OPINION BELOW

The order and opinion of the United States Court of Appeals for the Third Circuit dismissing petitioner's petition for review was filed on July 17, 1989 to Third Circuit Docket No. 88-3657 (Appendix, 3a) and is reported at 879 F.2d 1173.

The Court of Appeals did not issue an opinion regarding rehearing. Its order dated August 15, 1989, denying rehearing and rehearing in banc is contained in the Appendix at 1a.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals denying petitioner's petition for rehearing and rehearing in banc was entered on August 15, 1989. The judgment of the Court of Appeals dismissing the petition for review was entered on July 17, 1989. This Court has jurisdiction of the petition for a writ of certiorari pursuant to the terms of 28 U.S.C. § 1254(1).

RULES AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1653:

> Defective allegations of jurisdiction may be amended upon terms, in the trial or appellate courts.

Rule 2, Federal Rules of Appellate Procedure provides as follows:

SUSPENSION OF RULES

> In the interest of expediting decision, or for other good cause shown, a court of appeals may, except as otherwise provided in Rule 26(b), suspend the requirements or provisions of any of these rules in a particular case on application of a party or in its own motion and may order proceedings in accordance with its direction.

Rule 3(c), Federal Rules of Appellate Procedure provides,

in pertinent part, as follows:

> This notice of appeal shall specify the party or parties taking the appeal . . . . An appeal shall not be dismissed for informality of form or title of the notice of appeal.

Rule 15(a), Federal Rules of Appellate Procedure provides, in pertinent part, as follows:

> (a) PETITION FOR REVIEW OF ORDER; JOINT PETITION.
>
> Review of an order of an administrative agency, board, commission, or officer . . . shall be obtained by filing with the clerk of a court of appeals which is authorized to review such order, within the time prescribed by law, a petition to enjoin, set aside, suspend, modify or otherwise review, or a notice of appeal, whichever form is indicated by the applicable statute. . . . The Petition shall specify the parties seeking review and shall designate the respondent and the order or part thereof to be reviewed . . . . In each case the agency shall be named respondent.

Rule 39(a), Federal Rules of Appellate Procedure provides as follows:

> (a) TO WHOM ALLOWED.
>
> Except as otherwise provided by law, if an appeal is dismissed, costs shall be taxed against the appellant unless otherwise agreed by the parties or ordered by the court; if a judgment is affirmed,

> costs shall be taxed against the appellant unless otherwise ordered; if a judgment is reversed, costs shall be taxed against the appellee unless otherwise ordered; if a judgment is affirmed or reversed in part, or is vacated, costs shall be allowed only as ordered by the court.

Rule 43(a), Federal Rules of Appellate Procedure provides, in pertinent part, as follows:

> (a) DEATH OF A PARTY.
>
> . . . If a party entitled to appeal shall die before filing a notice of appeal, the notice of appeal may be filed by that party's personal representative, or if there is no personal representative, by that party's attorney of record within the time prescribed by these rules. After the notice of appeal is filed substitution shall be effected in the court of appeals in accordance with the subdivision.

Rule 43(b), Federal Rules of Appellate Procedure provides, in pertinent part, as follows:

> (b) SUBSTITUTION FOR OTHER CAUSES.
>
> If substitution of a party in the court of appeals is necessary for any reason other than death, substitution shall be effected in accordance with the procedure prescribed in subdivision (a).

Rule 46(c), Federal Rules of Appellate Procedure provides in pertinent part, as follows:

(c) DISCIPLINARY POWER OF THE COURT OVER ATTORNEYS.

A court of appeals may, after reasonable notice and an opportunity to show cause to the contrary, and after hearing, if requested, take any appropriate disciplinary action against any attorney who practices before it for conduct unbecoming a member of the bar or for failure to comply with these rules or any rule of the court.

Rule 11, Federal Rules of Civil Procedure provides, in pertinent part, as follows:

SIGNING OF PLEADINGS, MOTIONS AND OTHER PAPERS; SANCTIONS.

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated . . . . The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation . . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the

> person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Rule 15(c), Federal Rules of Civil Procedure provides, in pertinent part, as follows:

> (c) RELATION BACK OF AMENDMENTS.
>
> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing, the action against the party to be brought in by amendment, that party (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

STATEMENT OF THE CASE

On December 11, 1986, Administrative Law Judge ("ALJ") Robert J. Brissenden, dismissed the application of Peter Kowaleski for Black Lung benefits filed on March 6, 1978. The ALJ's opinion

contained a finding of fact that the applicant's wife, Anna Kowaleski, was an augmented beneficiary.[3] Anna Kowaleski died on June 10, 1979.[4] Prior to the ALJ's decision, a memorandum of the informal conference dated April 21, 1983, listed "Anna, as a dependent of the miner within the meaning of the Act."[5]

Also, on December 11, 1986, the ALJ concluded: ". . . [T]he deceased's wife is his sole dependent for purposes of augmentation of benefits under the Act, is not in dispute." He then recaptioned the case from the previous listing of "Peter Kowaleski vs. Director, Office of Workers' Compensation Programs, United States Department of Labor," to read:

> Anna Kowaleski, Widow of Peter Kowaleski vs. Director, Office of Workers' Compensation Programs, United States Department of Labor.

The ALJ denied benefits by an order which reads: "The claim of Peter Kowaleski for benefits under the Act is denied."

Counsel filed a timely notice of appeal with the Benefits Review Board utilizing the ALJ's caption and listed the petitioner as: "Anna Kowaleski, Widow of Peter Kowaleski" in the body of the petition for review. Since the ALJ's recaptioning, all parties

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3. An augmented beneficiary is a spouse who has no entitlement to benefits independent of the injured mine worker. 20 C.F.R. § 725.204(a). The amount of Peter Kowaleski's compensation would be increased for those months during which he was entitled to benefits and his wife was alive.

4. The death of Anna Kowaleski was a matter of record before the ALJ.

5. In 1985, approximately 2 years after the finding contained in the memorandum of informal conference, James T. Lesho, Esquire, became co-counsel for claimant, Kowaleski.

have utilized this caption for Mr. Kowaleski's claim.[6] The Benefits Review Board denied this appeal on August 31, 1988, and applied the same caption as the ALJ.

James T. Lesho, Esquire, as co-counsel for claimant, filed a petition for review to the Third Circuit on October 5, 1988, using the ALJ's caption.

The merits of this case involve an issue of nationwide importance both to the Director and claimants under the Black Lung Program.[7] The question presented to the Third Circuit was the one left open by this Court in *Pittston Coal Group, et al. v. Sebbon, et al.*, 109 S. Ct. 414 (1988).

Substantively, the instant litigation involves the question of whether the rebuttal provision in the Code of Federal Regulations (20 C.F.R. 727.203(b)(3) was applicable to this case in light of the decision in *Pittston Coal Group, supra,* which held that the interim provisions found at 20 C.F.R. Part 727 violated 30 U.S.C. § 902(f)(2). This issue was briefed and argued by the parties before a panel of the Third Circuit. Following oral argument, the court requested and received supplemental briefs on this issue.

Then, without addressing the merits, the Third Circuit *sua sponte,* by letter, raised two additional issues: (1) the propriety of Anna Kowaleski's inclusion in the caption; and, (2) the identity of any other individuals who claimed benefits through Peter Kowaleski.

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6. This caption has never caused any confusion as to the nature of this claim. The only application for benefits filed in this matter is that of Peter Kowaleski. This caption has been utilized to represent this fact by pleadings filed by the Director as well as the claimant. *See* Letter dated July 26, 1989 on behalf of Director (14a).

7. *See* Letter of July 25, 1989, on behalf of Director, Item #6 (15a).

On June 1, 1989, counsel Lesho responded by: (1) explaining the inadvertent captioning of the case by the ALJ; and (2) indicating his assumption that the proceeds would go to the estate of Peter Kowaleski and be distributed in accordance with his will.

On June 7, 1989, the court acknowledged counsel Lesho's explanation and requested a response as to why this claim should not be dismissed because of lack of jurisdiction.

On June 9, 1989, counsel filed a motion for substitution of claimant appellant, Charles P. Kowaleski, executor of the estate of Peter Kowaleski. The Director's counsel had no objection to this motion.

On July 17, 1989, the Honorable Max Rosen filed an opinion for the panel and concluded that the court does not have jurisdiction. He dismissed the case with prejudice and, *sua sponte,* taxed costs against James Lesho, Esquire. The Third Circuit did not provide counsel with any notice of its intent to impose sanctions or an opportunity for a hearing prior or subsequent to the imposition of costs.

James T. Lesho, Esquire, filed a petition for rehearing and rehearing in banc on July 28, 1989. This request was denied on August 15, 1989 (1a). In connection with the request for a rehearing, the Director of the United States Department of Labor wrote the following to the Third Circuit:

> 1. The caption was a mistake made first by the ALJ and not subsequently corrected in any pleadings by the parties.
>
> 2. The merits of the litigation were not affected by the ALJ's mistaken caption.

3. The only claim pending has been that of Peter Kowaleski; the entitlement of any other party derives from his entitlement.

4. The Director was informed that Mr. Kowaleski's estate was pursuing his claim at the hearing and has not been prejudiced.

5. To the best of my knowledge, the caption has not been left incorrect intentionally.

6. If the court possesses jurisdiction, it would address an issue of substantial importance to the Black Lung Benefits Program raised by this case.

See Letter of July 25, 1989 (14a-15a).

REASONS FOR GRANTING THE WRIT

I.

A CIRCUIT COURT OF APPEALS SHOULD NOT BE PROVIDED WITH THE UNFETTERED ABILITY TO IMPOSE SANCTIONS AGAINST COUNSEL IN THE FORM OF APPELLATE COSTS WITHOUT PROVIDING COUNSEL NOTICE AND AN OPPORTUNITY TO BE HEARD.

Imposition of sanctions against an attorney by a federal appellate court is an unmonitored exercise of judicial power, absent review by this Court.

There being no right of appeal or review from a circuit court decision, it is imperative that the possibility of sanctions be forewarned, and their imposition be constrained by the rule of law. To accomplish this purpose, Rule 46(c) of the Federal Rules of Appellate Procedure preconditions the exercise of this judicial

power upon reasonable notice and an opportunity to be heard: Appellate counsel below was given neither.[8]

Without so much as a nod to the appellate rules, the Third Circuit, *sua sponte,* imposed appellate costs on counsel.[9] This is simply penalty by judicial fiat. By failing to give notice or an opportunity to be heard, the court assures itself of only one point of view. By ignoring the requirements of its own rules, the court forestalls effective review of its command. It does not attempt to explain its position, confident that it cannot be called to account.

The fragile elegance inherent in the concept of due process can be crushed by a word. Not any word uttered by anyone, of course. But the weight of a federal appellate court is more than enough. Minimal due process requires a pre-sanction notice and an opportunity to be heard. *Roadway Express v. Piper,* 447 U.S. 752, 767 (1980); *In re Ruffalo,* 390 U.S. 544 (1970); *Mullane v. Central Hanover Bank and Trust Company,* 339 U.S. 306, 313 (1950). Mr. Lesho was not provided with anything other than an order to pay. His request to the panel to reconsider that was summarily rejected.

Left unreviewed, the Circuit Court has a most effective weapon for reducing its caseload — especially those appeals on behalf of parties too poor to be taxed costs. Now, attorneys

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8. James T. Lesho, Esquire, was appellant's counsel before the Third Circuit. He is a sole practitioner with an office in Pittston, Pennsylvania, a small community in northeastern Pennsylvania, not far from Hughestown, the site of the accident which gave rise to the decision in *Erie R.R. Co. v. Tompkins,* 304 U.S. 64, 69 (1938). The total costs taxed against Mr. Lesho is $76.20.

9. The concluding sentence of the Circuit Court opinion contains the only mention of costs. It states: "Costs will be taxed against James Lesho, Counsel for the nominal appellant." Rule 39(a) of the Federal Rules of Appellate Procedure taxes costs ". . . .against the appellant . . . ." if an appeal is dismissed.

representing middle income and low income appellants can be guarantors that the government will be paid its appellate costs. Unless, of course, private counsel is especially solicitous toward the judicial panel during argument; then, there is a good possibility that the unfettered judicial power to arbitrarily impose costs on counsel will not be exercised. Advocacy in the Third Circuit should not be subject to personal judicial caprice.[10]

II.

IN HOLDING THAT THE CLAIMANT, PETER KOWALESKI WAS NOT CORRECTLY DESIGNATED IN THE PETITION FOR REVIEW, THE COURT BELOW DECIDED A FEDERAL QUESTION IN CONFLICT WITH THIS COURT'S DECISIONS.

This Court decided in *Torres v Oakland Scavanger Co.*, ____ U.S. ____, 108 S. Ct. 2045, 101 L. Ed. 2d 285 (1988) certain issues

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10. The Third Circuit's decision is at odds with the requirements in other Circuit Courts of Appeals which provide for notice and an opportunity to be heard (usually a pre-sanction hearing); *In re Disciplinary Action Boucher*, 837 F.2d 869, 871 (9th Cir. 1988); *Tom Growney Equip. v. Shelley Irrig. Devel.*, 834 F.2d 833, 835-836 (9th Cir. 1987); *Donaldson v. Clark*, 819 F.2d 1551, 1560 (11th Cir. 1987) (*en banc*); *Matter of Snyder*, 734 F.2d 334, 336 (8th Cir. 1984), *rev'd*, 472 U.S. 634 (1985); *In re Bithoney*, 486 F.2d 319, 320 (1st Cir. 1973). The decision of the panel below is also inconsistent with the Third Circuit's position regarding the imposition of sanctions under Rule 11 of the Federal Rules of Civil Procedure. *Mary Ann Pensiero, Inc. v. Lingle (Pensiero II)*, 847 F.2d 90 (3rd Cir. 1988). It would appear that when the Third Circuit acts outside of the scope of the Federal Rules of Appellate Procedure, counsel should expect neither the protection of the Rules nor the protection of minimal due process. The Third Circuit decision imposing costs on counsel extends judicial authority to the point where judges may act "as their conscience, their opinions, their caprice or their politics might dictate." *Letters from a Federal Farmer, Letter XV*, 185, 195 (1788), reprinted in Storing, ed., *Complete Antifederalist*, II, 315.16, 322.

which are in direct conflict with the decision and judgment of the court below.[11]

First, this Court held that a party could satisfy Rule 3(c)'s requirement by "fil(ing) the functional equivalent of a notice of appeal." *Torres,* 101 L. Ed. 2d at 292.

Second, this Court held that a party filed "the functional equivalent of a notice of appeal" if the party was "named or otherwise designated, however inartfully, in the notice of appeal." *Id.*

Third, this Court held that the specificity requirements of Rule 3(c) were met if the notice of appeal contained "some designation that gives fair notice of the specific individual or entity seeking to appeal". *Id.* The decision of the Court of Appeals was in conflict with each of this Court's three holdings in *Torres, supra.*

First, the Court of Appeals did not address this Court's functional equivalency test. No analysis or inquiry was undertaken by the Court of Appeals to ascertain whether the petitioner here had, in fact, filed the functional equivalent of a petition for review.[12]

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11. The Third Circuit's decision here is also at odds with decisions in other Circuit Courts of Appeals. *See King v. Otasco, Inc.*, 861 F.2d 438 (5th Cir. 1988); *Ford v. Nicks*, 866 F.2d 865 (6th Cir. 1989); *Arrow v. U.S. Nuclear Regulatory Com'n*, 868 F.2d 233 (7th Cir. 1989); *Pope v. Mississippi Real Estate Com'n*, 872 F.2d 127 (5th Cir. 1989).

12. *See Dura Systems, Inc. v. Rothbury Investments, Ltd.*, Nos. 89-3005 and 89-3023 September 19, 1989 (3rd Cir. 1989) in which the Third Circuit Court of Appeals subsequently applied the functional equivalency test and stated: ". . .

(Cont'd)

Second, the Court of Appeals incorrectly applied this Court's ruling that the petition for review should be examined to see if the party attempting to appeal was "named or otherwise designated, however inartfully, in the Notice of Appeal." The Court of Appeals' examination of the petition for review is flawed because the name of the claimant, Peter Kowaleski, is present.

Lastly, the Third Circuit Court of Appeals performed no inquiry to ascertain what type of fair notice of Peter Kowaleski's claim was provided by the petition for review's designation of Anna Kowaleski, widow of Peter Kowaleski in the caption.

Rather, the Court of Appeals adhered to its rigid rule requiring the rejection of any appeal on behalf of any party who was not, in their view, correctly named in the petition for review. As a result, this Court's statement in *Torres, supra,* that the specificity requirement of Rule 3(c) can be met by a "designation that gives fair notice of the specific individual or entity seeking to appeal," was rendered meaningless.

The Court of Appeals' ruling on these three issues amounts to a repudiation of this Court's admonition that Courts of Appeals, in resolving issues of compliance under Rule 3(c), should determine whether "in light of all the circumstances, the rule had been complied with" and this Court's directive to construe the rule "liberally", and to avoid a construction that would allow "mere technicalities" to bar consideration of a case on the merits. *Torres, supra,* 101 L. Ed. 2d at 291, citing *Forman v. Davis,* 371 U.S. 178, 181 (1962). *See Houston v. Lock,* ____ U.S. ____, 108 S. Ct. 2379, 101 L. Ed. 2d 245 (1988).

(Cont'd)

(W)e follow the Court's directive to construe the rule 'liberally,' and to avoid a construction that would allow 'mere technicalities' to bar consideration of a case on the merits. *Torres,* 108 S. Ct. at 2408, *see also Forman v. Davis,* 371 U.S. 178, 181 (1962)."

The panel merely avoided deciding a difficult substantive issue by creating a jurisdictional paradox out of a perceived procedural defect.

III.

THE COURT OF APPEALS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL INTERRUPTION OF THE RULES AS TO REQUIRE THIS COURT'S SUPERVISION.

Despite the fact the caption of this case, the notice of appeal and the petition for review contained the name of Peter Kowaleski, the Court of Appeals held that any substitution for the name Anna Kowaleski was improper.

The Court below concluded:

> Although Torres only addressed the mandates of Rules 3 and 4, we must demand the same punctilious, literal, and exact compliance with the identical jurisdictional requirement in Rule 15 . . . . *Neither Peter Kowaleski's name nor that of his estate or Executor thereof appears in the caption or body of the Petition.* Unless the petition may be amended to include Peter Kowaleski or the executor of his estate, we may not exercise jurisdiction over an appeal by either party.

(Emphasis added.)

Purporting to interpret Rule 3(c) and to follow this Court's decision in *Torres, supra*, the Court of Appeals ignored the fact that only one claim was before the court. This was the claim of

Peter Kowaleski who had filed for Black Lung benefits. His name appears in every pleading.

The Court of Appeals believed that Rule 43(a) was inapplicable to this proceeding because the substitution of the executor of the estate of Peter Kowaleski for the widow was improper. This conclusion arose from the panel's mistaken belief that Anna was a nominal appellant who would have no real interest in this matter and was appearing on her own behalf. This conclusion was incorrect because the claim of Peter Kowaleski would have been augmented for the period of time Anna was alive. The ALJ's insertion of Anna's name in the caption never altered the nature of the claim under the federal Black Lung regulations. Anna never had an interest in the outcome of the proceedings except as a representative of Peter. Under the Black Lung Benefits Program, Anna could not receive any money. Peter, and only Peter would receive the monthly benefits check from this claim — which monthly check would have been higher while Anna was alive. The requested substitution is appropriate in accordance with Rule 43 especially in light of the fact that counsel for the Director doesn't object to this request and would not be prejudiced if the request is granted (*see* 15a). *Forman v. Davis,* 371 U.S. 178 (1962); *McSurely v. McClellon,* 753 F.2d 88 (1985).

The lower court's constriction of the petition for review requirements is such a departure from the accepted and usual way of interpreting legal documents that it requires this Court to exercise its power of supervision to correct the actions of the court below.

IV.

THE COURT OF APPEALS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN HOLDING THAT THE DEFECT IN THE PETITION FOR REVIEW COULD NOT BE CURED PURSUANT TO SUBSTITUTION IN LIGHT OF 28 U.S.C., § 1653 OR A SUSPENSION OF RULE 3(c) UNDER RULE 2, FED. R. APP. P.

In its opinion, the Court of Appeals held that because the time requirement of Rule 3(c) was jurisdictional, it lacked the authority to grant a motion to amend a petition for review and substitute the correct name for continuing forward with the claim of Peter Kowaleski. Whether a notice of appeal can be amended in this way is an important issue of federal law which has not been, but should be, settled by this Court.

In its decision in *Torres, supra,* this Court did not address the applicability of 28 U.S.C. § 1653. Moreover, because the Third Circuit held that the time requirements of Rule 3(c) were jurisdictional, and could not be waived or altered, any default under the rule could not be cured.

28 U.S.C. § 1653 specifically provides "Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts."

A defective allegation in a petition for review, such as incorrectly naming the decedent's representative, can be cured under 28 U.S.C. § 1653 by simply amending the petition for review to substitute the correct name.

Such a substitution of name should be effective where the substitution satisfies a requirement analogous to the requirements under Rule 15(c) of the Fed. R. Civ. P. for relation back to the

time of the original filing; *i.e.*, the respondent in the appeal has received such notice of an appeal that he or she will not be prejudiced in defending on the merits, and knew, or should have known, that, but for a mistake concerning identity of the proper name, the appeal would have included the purported representative for continuing on with the appeal of Peter Kowaleski (*see* Director's statement 1 to 6, 14a-15a).

Permitting substitution of Charles P. Kowaleski, executor of the estate of Peter Kowaleski, as the proper representative to continue on with the claim of Peter Kowaleski under 28 U.S.C. § 1653, with or without the suggested limitation derived from Rule 15(c), should be allowable under Rule 3(c). The appeal should not be dismissed for informality of form or title of the petition for review. The court below, however, held that substitution was not permissible.

This important issue should be settled by this Court. This Court can additionally consider whether Rule 2 can appropriately be used in conjunction with 28 U.S.C. § 1653 to effectuate proper substitution of a representative in the petition for review under Rule 3(c).

CONCLUSION

For all of the above reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING DATED AUGUST 15, 1989

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-3657

ANNA KOWALESKI, widow of PETER KOWALESKI,

Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

On Appeal for Review of a Final Order of the Benefits Review Board, United States Department of Labor
(BRB Docket No. 87-129 BLA)

SUR PETITION FOR REHEARING

Present: GIBBONS, *Chief Judge,* HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, and NYGAARD, *Circuit Judges.*

The petition for rehearing filed by appellants in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who

concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court in banc, is denied. The request of counsel James T. Lesho that this Court vacate the assessment of costs against him is denied.

BY THE COURT,

s/ A. Leon Higginbotham
Circuit Judge

Dated: August 15, 1989

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED JULY 17, 1989

Filed: July 17, 1989

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 88-3657

ANNA KOWALESKI,
widow of PETER KOWALESKI,
Petitioner

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Respondent

On Petition for Review of a Final Order of the Benefits Review Board, United States Department of Labor
BRB Docket No. 87-129 BLA

Argued April 11, 1989
Before: HIGGINBOTHAM, STAPLETON, and ROSENN, *Circuit Judges*
Opinion Filed July 17, 1989

JAMES LESHO, ESQUIRE (Argued)
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Appendix B

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OPINION OF THE COURT

ROSENN, *Circuit Judge.*

This appeal strikingly illustrates the necessity for lawyers to be familiar with applicable legal procedural rules and to comply with them. Counsel for petitioner presented a petition for review to this court in the name of Anna Kowaleski, as widow of the original claimant, Peter Kowaleski, challenging the Benefits Review Board's denial of black lung benefits under 20 C.F.R. § 727.203 (1988). We have subsequently raised, *sua sponte*, the threshold issue of whether we have jurisdiction over the appeal. Because the real party in interest has not appealed, we conclude that we do not have jurisdiction and must dismiss this case with prejudice.

I.

This appeal presents us with a bizarre and somewhat incomprehensible procedural history, primarily because of the lack of assiduousness of counsel for the petitioner. On March 6, 1978, Peter Kowaleski, a miner for twelve years, filed a claim with the Department of Labor seeking black lung benefits

available under 20 C.F.R. § 727.203. .In his initial application, Peter Kowaleski listed his wife, Anna Kowaleski, as his sole dependent. Anna Kowaleski subsequently died on June 10, 1979, while her husband's claim was still pending administratively.

After an administrative denial of benefits in 1983, Peter Kowaleski was granted a formal hearing on May 9, 1984, the contested issues being length of employment, causal relation, and total disability.

Kowaleski died on March 1, 1985, prior to the formal hearing and his son, Charles Kowaleski, was appointed as executor of the estate (executor). The executor authorized James T. Lesho, Kowaleski's counsel for the black lung claim, to continue representation in behalf of the estate. Although Lesho failed to formally substitute the executor on the record as the claimant, the administrative law judge (ALJ) noted at the hearing that Kowaleski had died and that the claim would be pursued in behalf of the estate.

On December 11, 1986, the ALJ filed his decision and entered an order denying the "claim of Peter Kowaleski." The caption of the order inexplicably listed as claimant, "Anna Kowaleski, widow of Peter Kowaleski." Anna Kowaleski, however, having predeceased Peter Kowaleski, was not and could not have been, his widow. No explanation appears of record for the decision to substitute Anna Kowaleski, and counsel for the parties failed to bring to the court's attention the error or attempt to rectify the record.

Counsel, instead, exacerbated the problem by pursuing the claim in the name of Anna Kowaleski. On May 15, 1987, he filed a petition for review with the Benefits Review Board as counsel for the claimant, Anna Kowaleski, widow of Peter Kowaleski. Lesho specifically represented that the petitioner is "Anna Kowaleski, widow of Peter Kowaleski, who resides at

R. 182 Mason Street, Exeter, Pennsylvania 18643." Although there is no evidence that Anna Kowaleski or the executor of her estate ever authorized Lesho to represent her interests in any matter, Lesho executed the petition as "representative for the claimant, Anna Kowaleski, widow of Peter Kowaleski." Lesho did not inform the Board that Mrs. Kowaleski had died almost eight years prior to the appeal and almost five years before her husband.

After the Benefits Review Board denied the claim on its merits, Lesho, as "Co-Counsel for Petitioner," filed a petition for review in this court on October 5, 1988, again in behalf of "Anna Kowaleski, Widow of Peter Kowaleski." Following oral argument, this court became aware of the possibility that the purported claim was not properly before this court.

By letter dated June 7, 1989, the Clerk of the Court highlighted these foregoing facts to petitioner's counsel and requested a response as to why the case should not be dismissed for want of an appealable order. Counsel, without directly responding to that request filed a motion on June 12, 1989, to substitute the executor of Peter Kowaleski's estate as party-appellant. Counsel cited no legal or statutory authority in support of his motion at this stage of the proceedings and at this time. Counsel for the Director also failed to make any direct response, though petitioner's motion claims that the opponent has no objection to the substitution.

We now turn to the interrelated threshold issues of whether we have jurisdiction over the appeal, and, if not, whether the executor may now be substituted by amendment to the petition in this court so that we may exercise jurisdiction over this matter.

Appendix B

II.

As a preliminary matter, we note that the current petition before this court lacks a real party in interest. Under the applicable regulations, "[b]enefits are provided under this Act to a miner who is totally disabled due to pneumoconiosis and to certain *survivors of a miner* who died due to or while totally . . . disabled by pneumoconiosis," including a "surviving spouse." 20 C.F.R. §§ 727.201, 725.201(2) (1988); *see also* 20 C.F.R. § 410.200 (1988).[1] The petition for review here was brought solely in the name of and for the benefit of Anna Kowaleski, as purported widow of the original claimant, Peter Kowaleski. Anna Kowaleski, however, predeceased her husband. Because Anna Kowaleski's entitlement under the Act depended on surviving her husband, neither she nor her estate had any cognizable legal interest in this litigation.[2]

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1. During the lifetime of an eligible miner a dependent has no claim to benefits, though the existence of dependents would serve to augment benefit payments to that miner. *See* 20 C.F.R. § 725.201; 20 C.F.R. §§ 410.200, 410.510(c).

2. Although the original error appears to lie with the ALJ in his unfortunate captioning of this case, it was inexcusable error for counsel to have then pursued this claim as counsel for and in the name of Anna Kowaleski, "widow of Peter Kowaleski."

We also question the propriety of counsel's assertion in the petition for review in behalf of Anna Kowaleski that he acted as "Co-Counsel for Petitioner [Anna Kowaleski]." The record indicates that counsel was retained in 1985, almost six years after the death of Anna Kowaleski. There is no indication that Anna Kowaleski or the representatives of her estate ever consented to representation by counsel in any matter in her behalf. We assume that counsel either did not understand the limitations of his representation of Peter Kowaleski or merely chose the seemingly less complicated path of altering the scope of his representation to match the caption of the case rather than moving to remedy the caption of the case to reflect the interests of Peter Kowaleski, his only client

Appendix B

We now turn to the issue of whether we have now or may acquire jurisdiction over an appeal by the executor, a party unnamed in the petition for review, as requested in the motion for substitution filed by petitioner's counsel.

The proper form and timing of an appeal from a decision of the Benefits Review Board are governed by Appellate Rule 15(a). That rule provides in pertinent part that the petition for review "shall specify the parties seeking review" "within the time prescribed by law." Fed. R. App. P. 15(a) (West 1980). Section 422(a) of the Black Lung Benefits Act, 30 U.S.C.A. § 932(a) (West 1986), incorporating section 21(c) of the Longshoreman's Act, 33 U.S.C.A. § 921(c) (West 1986), requires that a petition for review of an order of the Benefits Review Board be filed in the court of appeals within sixty days following issuance of that order.

The Supreme Court recently held that Appellate Rules 3 and 4, the counterparts to Rule 15, constitute a "single jurisdictional threshold," such that the failure to name a party in a notice of appeal or to amend the notice within the time for filing an appeal deprives the court of appeals of jurisdiction over the unnamed parties. *Torres v. Oakland Scavenger Co.*, 56 U.S.L.W. 4740, 4741 (1988). Employing language identical to that of Rule 15, Rule 3(c) requires that the notice of appeal "specify the parties seeking review." Fed. R. App. P. 3(c) (West 1980). Rule 4 further requires that the notice be filed within a certain time frame. Fed. R. App. P. 4 (West 1980). In *Torres*, both the notice of appeal and the order of the court of appeals inadvertently omitted petitioner's name. The Court, observing that Rule 3(c) required a notice of

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and the real party in interest. In either case, we admonish counsel in the future to recognize the limits of client representation and to act accordingly.

appeal to specify all parties appealing from a court order, rejected petitioner's claim that the designation, "et al.," following the first appellant's name, sufficiently demonstrated petitioner's intent to appeal under Rule 3(c).

Accordingly, the Court held that, although the rules may be liberally construed, a court "may not waive the jurisdictional requirements of Rules 3 and 4, even for 'good cause shown' under Rule 2, if it finds that they have not been met." *Torres*, 56 U.S.L.W. at 4741. The Court further stated:

> Applying these principles to the instant case, we find that petitioner failed to comply with the specificity requirement of rule 3(c), even liberally construed. Petitioner did not file a functional equivalent of a notice of appeal; he was never named or otherwise designated, however inartfully, in the notice of appeal filed by the fifteen other intervenors. Nor did petitioner seek leave to amend the notice of appeal within the time limits set by Rule 4. Thus, the court of appeals was correct that it never had jurisdiction over petitioner's appeal.

Id. at 4741-41; *see also Farley Transp. Co. v. Santa Fe Trail Transp. Co.*, 778 F.2d 1365, 1369 (9th Cir. 1985). Rules 3 and 4, as interpreted in *Torres*, therefore, require the court "to insist on punctilious, literal, and exact compliance with the requirement in Rule 3(c) that the notice of appeal . . . 'shall specify the party or parties taking the appeal.'" *Allen Archery, Inc. v. Precision Shooting Equip., Inc.*, 857 F.2d 1176, 1177 (7th Cir. 1988); *see also Ford v. Nicks*, 866 F.2d 865, 869-70 (6th Cir. 1989); *United States v. Rivera Construction Co.*, 863 F.2d 293, 298-99 (3d Cir. 1988); *Santos-Martinez v. Soto-Santiago*, 863

F.2d 174, 177 (1st Cir. 1988); *DeLuca v. Long Island Lighting Co.*, 862 F.2d 427, 429-30 (2d Cir. 1988).

Although *Torres* only addressed the mandates of Rules 3 and 4, we must demand the same punctilious, literal, and exact compliance with the identical jurisdictional requirement in Rule 15 that the petition for review "shall specify the parties seeking review." Petitioner, however, has utterly failed to comply with the requirements of that rule. Anna Kowaleski is the only party named in the petition for review and the petition was filed only in her behalf. Neither Peter Kowaleski's name nor that of his estate or executor thereof appears in the caption or body of the petition. Unless the petition may be amended to include Peter Kowaleski or the executor of his estate, we may not exercise jurisdiction over an appeal by either party.

In an apparent effort to amend the petition to reflect the real party in interest, counsel for petitioner belatedly filed with this court a motion to substitute the executor as claimant-appellant.[3] Because Anna Kowaleski is the only claimant-appellant of record before this court, the motion for substitution, if granted, would serve only to substitute the executor of the estate of Peter Kowaleski for Anna Kowaleski who

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3. Until this court confronted petitioner's counsel with the suggestion that this appeal lacked a real party in interest, this petition was never pursued in the name of the real party in interest, Peter Kowaleski, or in behalf of his estate. Although counsel for petitioner should have been aware that, since the issuance of the opinion of the ALJ, this claim has been erroneously pursued in behalf of a person who had died many years prior to the time her interest would have arisen, that is, the date of her husband's death, counsel never informed the various adjudicative bodies of the error. To his credit, perhaps, counsel has not attempted to justify to this court his failure either to notify the court of the error or to remedy the problem prior to this court's action.

has, as discussed, no cognizable interest in this matter.[4]

Given the futility of the Motion to Substitute as it now stands, we presume that counsel seeks to substitute the executor for the interests of Peter Kowaleski, and thereby make the executor a party to these appellate proceedings. Such a motion presupposes, however, that we could first grant leave to amend the petition for review to reflect the interest of Peter Kowaleski. This poses an insurmountable problem.

As the Court recognized in *Torres*, a motion for leave to amend a notice of appeal to include unnamed parties must be filed within the time limits for filing a notice of appeal set forth in Rule 4. Failure to timely file a motion to amend deprives the court of jurisdiction over the unnamed parties. *Torres*, 56 U.S.L.W. at 4741. Similarly, a motion to amend a petition for review to name a person not already a party to the appeal must be filed within the time limits for filing the original petition, that is, within sixty days of the entry of the Benefits Review Board order. 33 U.S.C.A. § 921(c).

Here, the motion to substitute/amend was not filed until June 12, 1989, more than two years after entry of the order of the Benefits Review Board. Because the motion was not timely filed, the petition

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4. Although counsel provides no statutory or legal authority for substitution of parties, Appellate Rule 43 provides for substitution of a party by his or her personal representative or other person either where the party dies while a proceeding is pending in the court of appeals or where such substitution is otherwise necessary. Fed. R. App. P. 43 (West 1980 & Supp. 1989). The personal representative, however, stands in place of the substitute party and therefore acquires only the rights of that party. Consequently, the executor, as a substitute for the nominal appellant, Anna Kowaleski, would have no real interest in this matter.

for review cannot be amended to specify either Peter Kowaleski or his executor as a petitioning party. We therefore lack jurisdiction over an appeal by either Peter Kowaleski or the executor of his estate.[5]

Although the result we reach today may appear oppressive, we believe that the harshness, if any, stems more from the ineptitude of the interested parties and their counsel than from the strictures of the jurisdictional prerequisites of Rule 15. Counsel has had ample opportunity over a period of years not only to make the appropriate substitute of the executor for Peter Kowaleski but also to amend the petition for review to specify the true party in interest, that is, either Peter Kowaleski or the executor of his estate. Regardless of the unfortunate captioning of the ALJ's order, we cannot permit the parties and counsel to use that initial error to shield themselves from the consequences of their subsequent behavior which served merely to compound the confusion rather than to provide illumination.

III.

Accordingly, the motion for substitution will be denied and the petition for review will be dismissed with prejudice for lack of jurisdiction over a real party in interest.

Costs will be taxed against James Lesho, counsel for the nominal appellant.

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5. Although counsel for the Director apparently does not object to the substitution, this issue is one of jurisdiction and cannot be waived by the parties.

Appendix B

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX C — LETTER OF JULY 25, 1989 FROM THE DIRECTOR OF THE UNITED STATES DEPARTMENT OF LABOR

U.S. DEPARTMENT OF LABOR

Office of the Solicitor
Washington, D.C. 20210

James T. Lesho, Esq.
26 Regina Street
Wilkes-Barre, PA 18702

Re: *Anna Kowaleski, widow of Peter Kowaleski v. Director, OWCP,* No. 88-3657

Dear Mr. Lesho:

I will be happy to address the numbered statements in your July 24, 1989 letter, although I am not sure it will accomplish your goal. The court has strictly construed the jurisdictional requirements of Fed. R. App. P. 15(a), requiring "punctilious, literal, and exact compliance." Neither the lack of prejudice to the Director nor the importance of the merits of the case justify an exception to a jurisdictional requirement. Moreover, even though any neglect in properly captioning any documents subsequent to the ALJ's decison may be excusable, such excuse would not require the court to ignore a jurisdictional command. Nevertheless, in answer to your request that we agree with your statements, the Director will state as follows:

1. The caption was a mistake made first by the ALJ and not subsequently corrected in any pleadings by the parties.

2. The merits of the litigation were not affected by the ALJ's mistaken caption.

3. The only claim pending has been that of Peter Kowaleski; the entitlement of any other party derives from his entitlement.

4. The Director was informed that Mr. Kowaleski's estate was pursuing his claim at the hearing and has not been prejudiced.

5. To the best of my knowledge, the caption has not been left incorrect intentionally.

6. If the court possesses jurisdiction, it would address an issue of substantial importance to the Black Lung Benefits Program raised by his case.

If I can answer any further inquiries, please let me know.

Sincerely,

s/ Michael J. Denney
Michael J. Denney
Counsel for Appellate Litigation
U.S. Department of Labor
(202) 357-0418

(2)

No. 89-759

In the Supreme Court of the United States

OCTOBER TERM, 1989

ANNA KOWALESKI, WIDOW OF PETER KOWALESKI, AND JAMES T. LESHO, ESQUIRE, PETITIONERS

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals properly dismissed a petition for review pursuant to Fed. R. App. P. 15 because it was not taken in the name of the real party in interest and because the motion to substitute parties was not timely filed.

2. Whether the court of appeals properly ordered that costs be taxed directly against James Lesho, as counsel for the "nominal appellant," when it dismissed a petition for review.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-759

ANNA KOWALESKI, WIDOW OF PETER KOWALESKI, AND JAMES T. LESHO, ESQUIRE, PETITIONERS

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 3a-13a) is reported at 879 F.2d 1173. The decisions of the Benefits Review Board and the administrative law judge (App., *infra*, 1a-14a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 17, 1989. A motion for rehearing was denied

on August 15, 1989 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on November 13, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Peter Kowaleski (the "miner") filed an application for benefits under the Black Lung Benefits Act of 1972, 30 U.S.C. 901 *et seq.*, which provides benefits to coal miners (and eligible survivors) who are totally disabled or die due to pneumoconiosis that arose out of coal mine employment (Pet. App. 4a-5a; App., *infra*, 6a). In his application, the miner listed his wife, Anna Kowaleski, as his sole dependent (Pet. App. 5a). On June 10, 1979, while the claim was pending at the administrative level, Anna Kowaleski died (*ibid.*).

The Department of Labor denied the claim on its merits in 1983 (Pet. App. 5a), but granted the miner's request for a formal hearing. On March 1, 1985, while the case was pending, the miner died (*ibid.*). Charles Kowaleski, the executor of the miner's estate, authorized James T. Lesho, the miner's counsel for the black lung claim, to continue representation on behalf of the estate (*ibid.*).

On December 11, 1986, the administrative law judge issued a decision and order denying benefits (App., *infra*, 6a-14a). Although the administrative law judge erroneously named "Anna Kowaleski, widow of Peter Kowaleski" as the claimant in the caption to the order, counsel did not move to have this error corrected, and instead appealed the case to the Benefits Review Board in the name of and purportedly on behalf of the deceased Anna Kowaleski (Pet. App. 5a).

By order of August 31, 1988, the Benefits Review Board affirmed the administrative law judge's denial of benefits (App., *infra*, 1a-5a). Apparently confused by the captioning of the case, the Board incorrectly noted in its decision and order that the claim was being pursued by Anna Kowaleski (App., *infra*, 2a n.1). Anna Kowaleski had never authorized counsel to represent her interests, if any, in the matter (Pet. App. 6a).

2. On October 5, 1988, counsel filed a notice of appeal with the court of appeals, again on behalf of "Anna Kowaleski, Widow of Peter Kowaleski" (Pet. App. 6a). By letter of June 7, 1989, the court requested that counsel show cause why the case should not be dismissed for lack of an appealable order (*ibid.*). Counsel did not respond directly to the court's request, but filed a motion on June 12, 1989, to substitute Charles Kowaleski, the executor of the miner's estate, for Anna Kowaleski (*ibid.*).

The court of appeals denied the motion to substitute the executor and dismissed the appeal for lack of a real party in interest (Pet. App. 12a). The court noted at the outset that the petition for review lacked a real party in interest: Anna Kowaleski's or her estate's entitlement to black lung benefits depended on her surviving her husband, and she had in fact predeceased him (*id.* at 7a). The court relied on this Court's holdings, in an analogous context, that "the failure to name a party in a notice of appeal or to amend the notice within the time for filing an appeal deprives the court of appeals of jurisdiction over the unnamed parties." *Id.* at 8a, citing *Torres* v. *Oakland Scavenger Co.*, 108 S. Ct. 2405 (1988). The court concluded that although *Torres* had concerned the mandates of Federal Rules of Ap-

pellate Procedure 3 and 4, "the same punctilious, literal, and exact compliance" was required "with the identical jurisdictional requirement in Rule 15 that the petition for review 'shall specify the parties seeking review' " (Pet. App. 10a). The court next determined that it could not acquire jurisdiction over the petition by granting the belated request to substitute the miner's executor for Anna Kowaleski. Even if the court were to construe the motion as a request to substitute the miner's executor for the interests of the miner (as opposed to the interests of Anna Kowaleski), the motion was not filed within the time limits for filing the original petition, and thus had to be denied under *Torres*. *Id.* at 10a-12a.

Finally, the court noted that its result stemmed "more from the ineptitude of the interested parties and their counsel than from the strictures of the jurisdictional prerequisites of Rule 15" (Pet. App. 12a; see also *id.* at 4a, 7a n.2, 10a n.3). The court taxed costs against James Lesho, counsel for the "nominal appellant" (*id.* at 12a).

ARGUMENT

The decision of the court of appeals to dismiss is correct and applies well-established principles to the particular facts of this case. Moreover, the court properly taxed costs directly against attorney James Lesho under Fed. R. App. P. 39, because no other person against whom costs could have been assessed was before the court.

1. Rule 15 of the Federal Rules of Appellate Procedure requires that a petition for appellate review of an agency order be filed "within the time prescribed by law" and that the petition "shall specify the parties seeking review." The requirements of

Rule 15 for obtaining review of an administrative decision thus track those of Federal Rules of Appellate Procedure 3 and 4 for obtaining review of a district court decision.

In *Torres* v. *Oakland Scavenger Co.*, 108 S. Ct. 2405, 2407 (1988), this Court held that the failure to name a party in a notice of appeal "constitutes a failure of that party to appeal." There, as the result of a clerical error, the notice of appeal omitted a party's name. Characterizing Appellate Rules 3 and 4 as establishing a "single jurisdictional threshold" (*id.* at 2408), the Court held that the failure to name a party in a notice of appeal or to amend the notice within the time for filing an appeal is more than "excusable 'informality'" (*id.* at 2407). Rather, it deprives the court of appeals of jurisdiction over the unnamed parties (*id.* at 2407-2409).

Petitioners do not challenge the court of appeals' conclusion that *Torres*, which addressed the mandates of Appellate Rules 3 and 4, equally applies to the identical jurisdictional requirement in Appellate Rule 15 that the petition specify the party seeking review. Nor do petitioners contest that since Anna Kowaleski, the only named petitioner for review, did not survive her husband, she has no entitlement to benefits and thus no cognizable interest in the claim. See 20 C.F.R. 725.201 (1988) (providing that benefits are payable to the miner or, if the miner is deceased, to certain specified survivors). Finally, it is undisputed that the motion to substitute the miner's executor for Anna Kowaleski was filed well after "the time prescribed by law." Section 422(a) of the Black Lung Benefits Act of 1972, 30 U.S.C. 932(a) (1982 & Supp. V 1987), incorporating Section 21(c) of the Longshore and Harbor Workers' Compensation

Act, 33 U.S.C. 921(c), requires that a petition for review of an order of the Benefits Review Board be filed in the court of appeals within 60 days after the issuance of that order.[1] In this case, the motion was filed on June 12, 1989, almost a year after the decision of the Benefits Review Board on August 31, 1988.

a. Nevertheless, petitioners assert (Pet. 13) that they filed the "functional equivalent" of a notice of appeal because the notice "named or otherwise designated [the appellant], however inartfully" or contained "some designation that gives fair notice of the specific individual or entity seeking to appeal." *Ibid.* (citing *Torres*, 108 S. Ct. at 2409). But while this court in *Torres* recognized that a litigant need only comply with the "functional equivalent" of what Appellate Rules 3 and 4 require, it established that a party who is not named or otherwise designated as the appellant in the notice has not filed the functional equivalent of a notice of appeal. 108 S. Ct. at 2409. Thus, the Court ruled that the use of the phrase "*et al.*" in the notice did not give fair notice of the party seeking to appeal. *Ibid.* Similarly here, although the petition for review indicated (erroneously) that Anna Kowaleski was the widow of Peter Kowaleski, it did not suggest that review was being sought on his behalf.

Indeed, the Benefits Review Board's understandable assumption that Anna Kowaleski was alive and had appealed the denial of benefits belies any suggestion that the designation in the petition for review

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[1] See *Brown* v. *Director, OWCP*, 864 F.2d 120 (11th Cir. 1989) (60-day appeal period jurisdictional); *Mussatto* v. *Director, OWCP*, 855 F.2d 513 (8th Cir. 1988) (same); *Danko* v. *Director, OWCP*, 846 F.2d 366 (6th Cir. 1988) (same).

fairly indicated that the executor of the estate of Peter Kowaleski was seeking review. It cannot be said that the notice given here met the specificity requirement of the Federal Rules of Appellate Procedure "to provide notice both to the opposition and to the court of the identity of the appellant or appellants." *Torres*, 108 S. Ct. at 2409.[2] The courts thus apply a bright-line test requiring that the notice of appeal clearly specify which of the parties is taking an appeal, thus "avoid[ing] the need to determine which parties are actually before the court long after the notice of appeal has been filed." See, *e.g.*, *Farley Transp. Co.* v. *Santa Fe Trail Transp. Co.*, 778 F.2d 1365, 1369 (9th Cir. 1985).[3]

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[2] The courts of appeals that have examined the issue in light of *Torres* have correctly rejected the notion that dismissal is appropriate only where the appellee might have been misled by the omission. See, *e.g.*, *In re Woosley*, 855 F.2d 687, 688 (10th Cir. 1988) (rejecting harmless error analysis in dismissing contempt appeal of attorneys taken in name of client); see also *Rogers* v. *National Union Fire Ins. Co.*, 864 F.2d 557, 559 (7th Cir. 1988) (finding naming requirement in Rule 3(c) jurisdictional and inflexible); *Allen Archery, Inc.* v. *Precision Shooting Equipment*, 857 F.2d 1176, 1177 (7th Cir. 1988) (recognizing that *Torres* changed the law of the circuit by requiring "punctilious, literal, and exact compliance" with specificity requirement).

[3] The cases that petitioners cite (Pet. 13 n.11) are not to the contrary; in each case the notice of appeal did specify the parties taking the appeal. See *King* v. *Otasco, Inc.*, 861 F.2d 438, 442-443 (5th Cir. 1988) (no lack of jurisdiction where appellant did not omit his name from notice of appeal but merely failed to designate all capacities in which he brought suit); *Ford* v. *Nicks*, 866 F.2d 865, 869-870 (6th Cir. 1989) (use of "*et al.*" was sufficient to perfect appeal for both parties because body of notice of appeal indicated that both plaintiffs were appealing); *Pope* v. *Mississippi Real Estate*

b. Petitioners also erroneously argue (Pet. 17-18) that the court of appeals should have substituted the miner's executor for Anna Kowaleski pursuant to Appellate Rule 2 or 28 U.S.C. 1653. In *Torres*, this Court rejected the suggestion that Appellate Rule 2, which gives the courts power to suspend the requirements of the Appellate Rules, can be used to avoid the jurisdictional requirement that a notice of appeal specify the party taking the appeal. Rather, the Court noted that Appellate Rule 26(b) acts as a limitation on this broad grant of equitable discretion by providing that appellate courts "may not enlarge the time for filing a notice of appeal." Fed. R. App. P. 26(b), *Torres*, 108 S. Ct. at 2407-2408. Appellate courts similarly may not enlarge the time for filing a petition for review of an agency order. Fed. R. App. P. 26(b).

Nor does 28 U.S.C. 1653, which provides that "[d]efective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts," permit a different result. The purpose of Section 1653 is to allow amendments of defective *allegations* of jurisdiction, not to provide a remedy for defective jurisdiction itself.[4] The court of appeals

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Comm'n, 872 F.2d 127, 129 (5th Cir. 1989) (same); *Arnow* v. *United States Nuclear Regulatory Comm'n*, 868 F.2d 223, 225 n.1 (7th Cir. 1989) (exhibit setting forth full names of every party, which was attached to and specifically referred to in notice of appeal, was sufficient to serve as notice that those parties were appealing).

[4] Compare, *e.g.*, *McCurdy* v. *Greyhound Corp.*, 346 F.2d 224, 225 n.1 (3d Cir. 1965) (Section 1653 permits amendment to cure defective allegation of corporate party's principal place of business), with, *e.g.*, *Field* v. *Volkswagenwerk AG*, 626 F.2d 293, 306 (3d Cir. 1980) (since diversity jurisdiction is to be determined by the citizenship of the parties at the time

dismissed this case for lack of jurisdiction not because the statement of jurisdiction was technically defective but because the real party in interest had not filed a timely petition for review or a timely motion to amend.[5]

2. Petitioner Lesho argues (Pet. 10-12) that the court of appeals denied him due process of law by ordering that costs—in the amount of $76.20—be taxed against him personally without giving him "pre-sanction notice and an opportunity to be heard." The assertion is without merit.

First, the court did not tax costs against Lesho as a sanction in this case. Rather, the court of appeals imposed costs pursuant to Appellate Rule 39(a), which requires taxation of costs against the appellant if an appeal is dismissed "unless otherwise agreed by the parties or ordered by the court."[6] In ordering that "[c]osts will be taxed against James Lesho, counsel for the nominal appellant" (Pet. App. 12a), the court indicated that Lesho was being taxed

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the action is commenced, Section 1653 does not permit the later substitution of a diverse representative of an estate for a non-diverse representative).

[5] Petitioners also assert (Pet. 15-16) that the court of appeals should have substituted the executor of the estate of Peter Kowaleski for Anna Kowaleski under Fed. R. App. P. 43(a). As the court of appeals noted, however, a party is substituted under Appellate Rule 43(a) only as the personal representative of a deceased party. Pet. App. 11a; *id.* at 10a-11a & n.4; Fed. R. App. P. 43(a). Thus, if the executor of the estate of Peter Kowaleski had been substituted here, it could have been only as the representative of Anna Kowaleski. See Pet. App. 11a n.4. Since that party has no real interest in the case, the substitution would be futile.

[6] Thus, the cases cited by petitioner (Pet. 11, 12 n.10), which involve imposition of sanctions and not taxation of costs under Rule 39, are not on point.

because, under the peculiar facts of the case, he effectively stood in the place of the appellant. There was, in fact, no appellant in the case against whom the court could otherwise assess costs. See, *e.g.*, *Hafter* v. *Farkas*, 498 F.2d 587, 591 (2d Cir. 1974) (costs assessed against lawyer where appeal taken without consent of client).

Second, the manner in which the court assessed costs in this case is consistent with the standard practice of the federal appellate courts under Appellate Rule 39 and provided Lesho all the process to which he was due. Pursuant to this rule, the prevailing party "bec[omes] entitled to an award of costs as a matter of course, save only to the extent that the court might direct otherwise." *Saunders* v. *Washington Metropolitan Area Transit Authority*, 505 F.2d 331, 333 (D.C. Cir. 1974). Appellate Rule 39(d) specifically requires a party who desires to be reimbursed for costs to file an itemized and verified bill of costs and provides that objections to the bill of costs be filed within ten days thereof. After the court of appeals ordered that the government's costs be taxed against Lesho, the Department of Labor filed a bill of costs with the court and served counsel with a copy. Lesho, like any individual against whom Rule 39 costs are claimed, could have objected to the $76.20 in claimed costs at that time, but did not do so. Cf. *United States* v. *Nesglo, Inc.*, 744 F.2d 887, 890 (1st Cir. 1984) (hearing not required prior to award of attorneys' fees and costs for frivolous litigation where appellants did not respond to motion for fees and costs and request hearing).

Finally, although Lesho asserts that he was not given an opportunity to object to the court's assessment of costs against him, it is doubtful that he would have profited from any such opportunity. While the court of appeals did not give advance no-

tice of its intention to tax costs directly against Lesho, it did give him the opportunity to argue why the case should not be dismissed for lack of a real party in interest. Lesho did not respond to this directly, but instead simply filed a motion for substitution of parties. Given the standard allocation of costs pursuant to Rule 39, Lesho should have known that his failure to name a real party in interest in a notice of appeal could lead to the assessment of costs against him directly. As this Court has held, the process that is "due" a party "turns, to a considerable extent, on the knowledge which the circumstances show such party may be taken to have of the consequences of his own conduct." *Link* v. *Wabash R.R.*, 370 U.S. 626, 632 (1962). As the Court found in that case, "[t]he circumstances here were such as to dispense with the necessity for advance notice and hearing." *Ibid.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1990

APPENDIX

U.S. DEPARTMENT OF LABOR
Benefits Review Board
1111 20th St., N.W.
Washington, D.C. 20036

BRB No. 87-129 BLA
OWCP No. 178-03-0335

ANNA KOWALESKI (Widow of PETER KOWALESKI),
CLAIMANT-PETITIONER

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
RESPONDENT

Appeal of the Decision and Order of
Robert J. Brissenden, Administrative Law Judge,
United States Department of Labor

DECISION and ORDER

[Filed Aug. 31, 1988]

Before: BROWN and DOLDER, Administrative Appeals Judges, and FEIRTAG, Administrative Law Judge.*

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* Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. § 921(b)(5) (Supp. IV 1986).

DOLDER, Administrative Appeals Judge:

Claimant, the miner's widow,[1] appeals the Decision and Order of Administrative Law Judge Robert J. Brissenden denying benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. § 901 *et seq.* (the Act). The administrative law judge found that claimant had established twelve years of coal mine employment and the parties had stipulated to the existence of pneumoconiosis pursuant to 20 C.F.R. § 727.203 (a)(1). The administrative law judge, however, denied benefits because he found the evidence sufficient to establish rebuttal pursuant to 20 C.F.R. § 727.203 (b)(2), (b)(3) and (b)(4). The administrative law judge also found that claimant was not entitled to benefits under 20 C.F.R. Part 410, Subpart D. Claimant, on appeal, contends that the administrative law judge erred in finding rebuttal pursuant to Section 727.203(b).[2] The Director, Office of Workers' Compensation Programs, has filed a response advocating affirmance of the administrative law judge's denial of benefits.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with the

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[1] The miner filed for benefits on March 6, 1978. DX-1. The miner died on March 1, 1985 and the miner's widow is pursuing the miner's claim for benefits.

[2] Since claimant fails to challenge the administrative law judge's finding of no entitlement under Part 410, this finding is affirmed. *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

law, they are binding upon this Board and may not be disturbed. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. § 921(b)(3), as incorporated by 30 U.S.C. § 932(a).

Claimant first challenges the administrative law judge's finding of rebuttal pursuant to subsection (b)(2). The administrative law judge, after considering the relevant evidence of record, found that the miner was not totally disabled by a respiratory or pulmonary impairment at the time of death and therefore concluded that rebuttal was established pursuant to subsection (b)(2). Subsequent to the administrative law judge's Decision and Order, the United States Court of Appeals for the Third Circuit held in *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 9 BLR 2-1 (3d Cir. 1986) that in order to establish rebuttal under subsection (b)(2), it must be shown that the miner is not disabled for whatever reason. A showing that the miner is not disabled for pulmonary or respiratory reasons is not sufficient to establish rebuttal under subsection (b)(2). Since this case arises within the Third Circuit, and the administrative law judge considered only whether the miner was disabled from a pulmonary or respiratory standpoint, the administrative law judge's finding of rebuttal pursuant to subsection (b)(2) cannot be affirmed. *See Kertesz, supra.*

Claimant also argues that the administrative law judge in concluding that the interim presumption was rebutted pursuant to subsection (b)(3), erroneously found Dr. Karlavage's opinion to be of little probative value. We disagree. The administrative law judge properly accorded greater weight to the opinion of Dr. Aquilina over that of Dr. Karlavage because Dr. Aquilina's report was better supported by the objective evidence of record and was corrobo-

rated by the remaining medical reports of record. *See Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). The administrative law judge's determination, based on Dr. Aquilina's report and the remaining medical evidence of record, that the presumption was rebutted pursuant to subsection (b)(3) is therefore affirmed. *See Carozza v. United States Steel Corp.*, 727 F.2d 74, 6 BLR 2-15 (3d Cir. 1984); *Bernardo v. Director, OWCP*, 790 F.2d 350, 9 BLR 2-26 (3d Cir. 1986). Furthermore, the administrative law judge's finding of rebuttal precludes entitlement under 20 C.F.R. Part 718. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986). *See generally Kiewlak v. Director, OWCP*, 11 BLR 1-34 (1988); *Tanner v. Freeman United Coal Co.*, 10 BLR 1-85 (1987); *Howell v. Westmoreland*, 9 BLR 1-61 (1986).[3]

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

/s/ Nancy S. Dolder
NANCY S. DOLDER
Administrative Appeals Judge

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[3] Although claimant established invocation pursuant to subsection (a)(1), we find the administartive law judge's determination of rebuttal pursuant to subsection (b)(4) to be harmless error in light of our affirmance of rebuttal pursuant to subsection (b)(3). *See Mullins Coal Company, Inc. of Virginia v. Director, OWCP*, 108 S.Ct. 427, 435 n.26, 11 BLR 2-1, 9 n.26 (1987); *Buckley v. Director, OWCP*, 11 BLR 1-37 (1988); *Tucker v. Consolidated Coal Co.*, 6 BLR 1-720 (1983). Additionally, under the Board's recent decision in *Whiteman v. Boyle Land and Fuel Coal Co.*, 11 BLR 1-99 (1988) (*en banc*) (McGranery and Brown, JJ., dissenting), claimant is not entitled to benefits under 20 C.F.R. § 410.490.

BROWN, Administrative Appeals Judge, and FEIRTAG, Administrative Law Judge, concurring:

In light of the decision of the United States Court of Appeals for the Third Circuit in *Halon v. Director, OWCP*, 713 F.2d 21, 5 BLR 2-115 (3d Cir. 1983), we believe that the claimant should be awarded benefits under 20 C.F.R. § 410.490. We shall abide, however, by the Board's decision in *Whiteman v. Boyle Land and Fuel Coal Co.*, 11 BLR 1-99 (1988) (*en banc*) (McGranery and Brown, JJ., dissenting), holding Section 410.490 inapplicable to Part C claims.

/s/ James F. Brown
JAMES F. BROWN
Administrative Appeals Judge

/s/ Eric Feirtag
ERIC FEIRTAG
Administrative Law Judge

Dated this 31st day of August 1988

U.S. DEPARTMENT OF LABOR

Date Issued: Dec. 11, 1986

Case No. 84-BLA-4694

OWCP No. 170-03-0335

IN THE MATTER OF

ANNA KOWALESKI, Widow of
PETER KOWALESKI, CLAIMANT

v.

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS, RESPONDENT

Before: ROBERT J. BRISSENDEN
Administrative Law Judge

DECISION AND ORDER—DENYING BENEFITS

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, as amended, 30 U.S.C. § 901 *et seq.* ("the Act"). In accordance with the Act and regulations issued thereunder, this case was referred by the Director, Office of Workers' Compensation Programs, to the Office of Administrative Law Judges for formal hearing.

Benefits under the Act are awardable to persons who are totally disabled due to pneumoconiosis, or to survivors of persons who were so totally disabled at the time of their death, or whose death was due to pneumoconiosis.

A formal hearing was held before the undersigned Administrative Law Judge on August 12, 1986, at Scranton, Pennsylvania, at which time the parties were afforded full opportunity to present evidence and argument as provided in the Act and regulations issued thereunder set out in Title 20, Code of Federal Regulations, Part 725 and 727.[1]

The issues are:

1. Length of coal mine employment.
2. Whether the miner's pneumoconiosis arose out of coal mine employment.
3. Whether the miner was totally disabled.

Findings of Fact and Conclusions of Law

Background

Claimant, who is deceased, was born on October 21, 1915, and had eight grades of education. The fact that he was a coal miner within the meaning of the Act is not in issue, but the number of years he so worked is in issue, as discussed below. He died in a veterans' hospital on March 1, 1985.

The fact that the deceased's wife, Anna, is his sole dependent for purposes of augmentation of benefits under the Act, is not in dispute (DX-17, 18).

This claim was filed on March 6, 1978 (DX-1). It was administratively denied on January 25, 1980 (DX-34), and was denied after review of additional

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[1] Cited provisions herein refer to sections of that Title. The following abbreviations are used: Director's, Claimant's, and Employer's Exhibits—DX, CX, and EX, respectively; Transcript, TR.

Counsel for the Director was given 15 days post-trial to submit case authority, but no submission was received.

information that had been submitted, on September 23, 1980 (DX-35).

This claim is adjudicated pursuant to the provisions of 20 C.F.R. Part 727, based upon the filing date and the length of coal mine employment, as discussed later.

Length of Coal Mine Employment

There is no objective documentary evidence relative to this issue. However, there is quite a lot of documentary material that may be, and is, considered. Claimant filed sworn and unsworn statements (DX-3 & 4), wherein he listed coal mine employment as a laborer at three coal mines from 1925 to 1938. That information is supported in part by written statements of friends and co-workers (DX-7, 9, 11, 13). Other written statements in the record are sympathetic, but of little, if any, assistance (DX-6, 8, 10, 12, 14, 15). There is no Social Security report of record. Giving the deceased the benefit of all doubt, I find that he had 12 years of coal mine employment, as he has maintained over the years.

Disability Due to Pneumoconiosis

The Act provides benefits to persons who are totally disabled due to pneumoconiosis. Section 727.203(a) of the regulations establishes a rebuttable "interim" presumption, where the miner has engaged in coal mine employment for at least 10 years, that the miner is totally disabled due to pneumoconiosis arising from his coal mine employment, if he meets any one of the criteria set forth in subsections (a)(1) through (a)(4) of that section. Since Claimant worked as a miner for over 10 years, he will be eligible for the presumption if he meets the appropriate criteria.

The presumption is invoked where x-ray evidence establishes the existence of pneumoconiosis. See §§ 727.203(a)(1) and 410.428. The Director did not place the existence of pneumoconiosis in issue, hence the matter is not subjected to analysis. There is some support for the Director's action in DX-29 (1/1 read by Dr. Mathur, a "B" reader) and DX-32 (1/0 p read by Dr. Conrad), but several x-ray interpretations, including the most recent one of May 17, 1983 (CX-4), found no pneumoconiosis. Further, no pneumoconiosis was found in the autopsy report (C-7) or a biopsy report following autopsy (DX-45). In view of the Director's acknowledgment that the deceased had pneumoconiosis, the presumption must be invoked. However, if he did have pneumoconiosis, it was of a mild nature, in view of the record.

Ventilatory Studies

The presumption also may be invoked if ventilatory studies establish the existence of a chronic respiratory or pulmonary disease (§ 727.203(a)(2)). In order to invoke the presumption, these studies must be both "qualifying" and "conforming." A qualifying study is a study which produces forced expiratory volume in one second (FEV_1) and maximum voluntary ventilation (MVV) values which are equal to, or less than, the values set out in 20 C.F.R. § 727.203(a)(2). In order to be considered conforming, the study must meet the quality standards set out in 20 C.F.R. § 410.430. The following ventilatory studies are of record:

Date	Exh.	Doctor	Ht.	FEV_1	Reg.	MVV	Reg.	Cooperation
5/12/78	DX-19	Hospital	70"	2.98	2.5	104.2	100	Good
1/30/80	DX-80	Karlavage	71"	1.90	2.6	70.04	104	Good
3/10/83	DX-22	Mathur	71"	2.19	2.6	111	104	Satisfactory
5/17/83	CX-4	Aquilina	71"	3.59	2.6	142.20	104	Excellent

The study of May 12, 1978, did not produce values within regulatory limits.

The test of January 30, 1980, produced values that qualify under the regulations, but the test was found not to be acceptable by Dr. Leon Cander, a highly qualified Department of Labor consultant because "none of the FEV tracings indicate maximum effort" (DX-21).

The study of March 10, 1983, did not produce qualifying values because of the high MVV, but in any event, this test was considered by Dr. Cander to be not acceptable because "Three FEV tracings representing maximum effort are not available. The MVV is acceptable" (DX-23).

The study of May 17, 1983, not only is the most recent one—it produced the best values of all tests, even those of several years earlier, which values are well above qualifying figures and were obtained with "excellent" cooperation.

The presumption of subsection (a)(2) is not invoked.

Blood Gas Studies

The presumption may also be invoked by blood gas studies which demonstrate an impairment in the transfer of oxygen from the lung alveoli to the blood as indicated by values equal to, or below, those set out in the chart in 20 C.F.R. § 727.203(a)(3). The following studies are of record:

Date	Exhibit	PCO_2	Observed PO_2	Regulation PO_2
12/19/79	DX-27	34.1	106	66
05/17/83	CX-4	35	86	65

Neither of these tests produced qualifying values, and the presumption of subsection (a)(3) is not invoked.

The presumption also may be invoked under 20 C.F.R. § 727.203(a)(4) on the basis of other medical evidence, including the documented opinion of a physician exercising reasoned medical judgment, which demonstrates the existence of a totally disabling respiratory or pulmonary impairment.

There is a note in the record on Dr. Karlavage's memo paper which states "Pt has been examined on 1/11/79. Pt has COPD & anthrasilicosis." That statement is supported by no objective evidence or explanation, and is given no weight (DX-24).

Dr. B. S. Berley examined the deceased on May 12, 1978 (DX-25). Based upon work and medical histories, and physical examination, Dr. Berley concluded "Insufficient evidence to warrant diagnosis of pneumoconiosis." No impairment was noted.

Dr. D. T. Scott examined the deceased on December 19, 1978 (DX-26). Based upon work and medical histories, and physical examination, Dr. Scott noted "no impairment." He diagnosed "Normal PE. anthracosilicosis by history," related to coal mining by history.

Dr. Karlavage stated in an undated document not addressed to any person, that he had seen the deceased on four separate occasions in his office, for shortness of breath and morning cough (CX-5). Dr. Karlvage stated that, based upon physical examination, work and medical histories and, Dr. Mathur's x-ray reading of 1/1 p, as well as pulmonary function tests of March 10, 1983 (discussed above), he was of the opinion that the deceased had pneumoconiosis and was totally disabled from doing coal mine work.

Dr. Charles Aquilina addressed a letter to Claimant's attorney on May 18, 1983 (CX-4). Dr. Aqui-

lina stated that he first saw Mr. Kowaleski in May 1983 on the chief complaint of shortness of breath. Based upon work and medical histories, physical examination, chest x-ray (ILO classification o), blood gas study (normal) and pulmonary function study (normal), Dr. Aquilina concluded, ". . . the possibility of this man being completely and totally disabled on the basis of his pulmonary disease is remote indeed."

CX-6 is a Veterans Administration report covering the deceased's last hospitalization and death. Chest x-rays of January 8, 1985 and January 15, 1985, were "normal." Diagnoses were non-Hodgkins Lymphoma, Adenocarcinoma of the prostrate gland, and Pancytopenia with sepsis due to radiation therapy and chemotherapy.

CX-7 contains the deceased's autopsy reports. It discusses the deceased's lengthy bout with lymphoma (seven years), and included in the diagnoses, anthracosis of hilar lymph nodes, among other diagnoses not relevant herein. It is stated "the immediate cause of death cannot be determined from the autopsy findings."

DX-45 is a biopsy report dated July 23, 1986, and signed by Dr. Richard Naeye. He examined four slides of lung tissue, and two of lymph nodes. Interpretation in pertinent part was no pneumoconiosis, and it is stated "Since coal worker's pneumoconiosis is absent, it could not have contributed in any way to this man's death."

In summary, Dr. Berley, Dr. Scott, Dr. Aquilina, a Veterans Administration Hospital and Dr. Naeye, all examined the deceased or his tissue, without finding total disability or death due to a respiratory or pulmonary impairment. Only Dr. Karlavage differs,

and in the face of overwhelming evidence contrary to his opinion, his opinion is not of weight.

The presumption of subsection (a)(4) is not invoked.

Rebuttal

As discussed above, the presumption of subsection (a)(1) stands alone, and that only because the existence of pneumoconiosis was not placed in issue. However, even though the rebuttal may be inadvertent, it exists. Several x-rays were read as negative, and more important, the most recent one was read as negative, albeit by a non-certified reader. Of even greater weight is the biopsy report. *Kimick v. National Mines Corp.*, 2 BLR 1-221 (1979). Reviewing all the evidence, it is clear that the deceased did not have pneumoconiosis and rebuttal is shown under § 727.203(b)(4).

So far as subsections (b)(2) and (b)(3) are concerned, Dr. Aquilina's report is the most detailed and complete one of record, and he was most emphatic that the deceased was not totally disabled by any respiratory or pulmonary impairment. That report is firmly supported by objective testimony, and has the further support of Drs. Berley, Scott, and Naeye, and the Veterans Administration. As noted, the objective record of pulmonary function tests and blood gas tests do not support a finding of pulmonary or respiratory disability. Rebuttal is well established under subsections (b)(2) and (3).

I find that the deceased was not disabled in life because of any respiratory or pulmonary impairment, and did not die because of pneumoconiosis or any such impairment.

Entitlement

Part 410

Claimant is entitled to have his claim considered under the regulations at 20 C.F.R. § 410, *et seq.*, and § 828.203(d). *Muncie v. Wolfe Creek Collieries Coal Co.*, 3 BLR 1-627 (1981). After considering this claim under the applicable sections of Parts 727 and 410, I conclude that the evidence of record does not prove that the deceased suffered from a totally disabling respiratory or pulmonary impairment. Therefore, Claimant is not entitled to benefits under the Act.

Attorney's Fee

The award of an attorney's fee under the Act is permitted only in cases in which the Claimant is found to be entitled to the receipt of benefits. Since benefits are not awarded in this case, the Act prohibits the charging of any fees to the Claimant for representative services rendered to him in pursuit of his claim.

ORDER

The claim of Peter Kowaleski for benefits under the Act is denied.

/s/ Robert J. Brissenden
ROBERT J. BRISSENDEN
Administrative Law Judge

RJB:scm

NOTICE OF APPEAL RIGHTS. Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 days from the date of this decision, by filing a notice of appeal with the Benefits Review Board, 1111 20th Street, Suite 757, Washington, D.C. 20036.

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